COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

In re Order Instituting Rulemaking to Establish Complaint and Enforcement Procedures to Ensure That Telecommunications Carriers and Cable System Operators Have Non-Discriminatory Access to Utility Poles, Ducts, Conduits, and Rights-Of-Way	DTE 98-36

COMMENTS OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC.

ON PROPOSED CHANGES TO 220 CMR 45.00 *et seq*.

I. INTRODUCTION

AT&T Communications of New England, Inc. ("AT&T") hereby files its comments on the proposed revisions to 220 CMR 45.00 *et seq*. pursuant to the solicitation of comments contained in the Department of Telecommunications and Energys Order Instituting Rulemaking issued December 9, 1998. AT&T welcomes the Departments initiative to develop rules for nondiscriminatory access to utilities poles, conduits and rights of way (collectively "Pathways"). As the Department recognized in 1995 when it found that this issue was within the scope of its Local Competition Docket, DPU 94-185, access to Pathways is a necessary precondition to the development of competition in the local telecommunications market. Moreover, enforceable rules are especially important for telecommunications carriers seeking access to Pathways of utilities with monopoly power in the local telecommunications market and an incentive to maintain it, such as Bell Atlantic.

While the Departments proposal is a significant improvement over the current rules, AT&T has two major concerns with it: (1) a lack of specificity in the Departments proposed rules necessary to define what non-discriminatory access is in situations that will most certainly arise; and (2) an ambiguity as to whether the proposed rules provide rights of non-discriminatory access to wireless carriers. To address those concerns, AT&T proposes specific changes and additions to the Departments proposed rules. *See*,

Exhibit A, attached hereto. In addition, AT&T recommends that the Department, like the public service commission in New York, adopt a standard form license agreement that provides a "default" position if the parties are unable to agree otherwise. The master license agreement that AT&T proposed in its arbitration proceeding with Bell Atlantic, DPU 96-80/81, is an example of a balanced license agreement that complies with the non-discriminatory requirements of the 1996 Telecommuniations Act. *See*, Exhibit B, attached hereto. Detailed rules and/or a standard form license agreement will reduce the possibility of involving the Department and the parties in inefficient, piece-mail litigation to resolve the numerous unanswered questions.

In Section I, below, AT&T proposes that the Department modify the language in its rules to make clear that wireless carriers are entitled to the right to nondiscriminatory access that the rules provide. If that is not the Departments intent, AT&T asks that the Department make its intent clear so that wireless carriers may go immediately to the Federal Communications Commission to vindicate their rights to nondiscriminatory access under 47 U.S.C. § 224. In Section II, below, AT&T proposes that the Department supplement its proposed rules to define the meaning of non-discriminatory access in light of AT&Ts past experience with Bell Atlantics license agreements.

II. THE DEPARTMENT SHOULD CLARIFY WHETHER WIRELESS TELECOMMUNICATIONS CARRIERS ARE ENTITLED TO NON-DISCRIMINATORY ACCESS UNDER THE DEPARTMENTS RULES.

The proposed amendments to the DTEs rules leave some doubt as to the attachment rights of wireless telecommunications carriers (also identified herein as "attaching carriers") in Massachusetts. The DTE should make it clear that, as telecommunications carriers, wireless carriers have the same rights of non-discriminatory access that wireline carriers have. AT&T has proposed rules to accomplish that. *See* AT&T proposed rule, Section 45.02. Alternately, if the Department does not intend that its rules apply to wireless carriers, then it should so state to make clear that its "reverse preemption" does not extend to wireless carriers and thus clear the way for wireless carriers to vindicate their rights to non-discriminatory access at the Federal Communications Commission.

Under the Federal Pole Attachment Act,[(1)] as amended by the Telecommunications Act of 1996 ("1996 Act"), wireless carriers are entitled to attachment rights on the same basis as other telecommunications carriers.[(2)] The attachment rights of wireless carriers flow directly from the plain language of the statute, which accords such rights to "*any* telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way."[(3)] A "telecommunications carrier" is "any provider of telecommunications services," 47 U.S.C. § 153(44), and a "telecommunications service" is "the offering of telecommunications for a fee directly to the public . . . *regardless of the facilities used*." 47 U.S.C. § 153(46) (emphasis added). Wireless providers are unquestionably "telecommunications carriers."[(4)] While wireless attachments may pose somewhat different technical and cost issues than wireline attachments, the Federal Communications Commission has held that the rules governing the rates, terms, and conditions of attachment to utility poles should be the same for all telecommunications carriers. *See Pole Attachment Order* at ¶¶ 41-42.

Of course, the states can displace the Commissions pole attachment regulations by adopting their own rules. *See* 47 U.S.C. § 224(c)(1). In order to exercise this "reverse preemption" authority, however, a state must certify that it actually provides telecommunications carriers with a right of access to poles and

regulates the rates, terms, and conditions of attachment; it cannot simply reject the federal regulatory scheme without protecting the rights of attaching carriers and their customers. *See* 47 U.S.C. § 224(c) (establishing standards for state rules). Thus, if the DTE chooses to claim jurisdiction over wireless attachments, it must guarantee wireless carriers the same attachment rights as wireline providers.

The Massachusetts pole attachment statute does not explicitly authorize the DTE to regulate wireless attachments. Indeed, the statutory definition of "attachment" as a "wire or cable" used for telecommunications, M.G.L.A. 166 § 25A, might be construed to exclude antennae and other wireless equipment. Similarly, the Massachusetts statute extends the benefit of pole attachment rules only to "licensees," meaning entities "authorized to construct lines or cables upon, along, under, and across the public ways," *id.*, and some wireless carriers may lack the requisite authority to place facilities on rights of way.

Despite these definitional uncertainties, however, there are good reasons for applying the statute to attachments by wireless carriers. First and foremost, such an interpretation would ensure that wireless carriers can obtain the benefits of the pole attachment law and are not impeded by exorbitant attachments rates or practices that otherwise foreclose them from access to poles. Applying the statute requirements to wireless carriers would be consistent with the overall intent of the law and the DTEs ongoing efforts to promote telecommunications competition.[(5)]

In practice, moreover, wireline as well as wireless carriers use a mix of wires, cables, and radios in their networks. Even carriers that rely predominantly on wires hung from poles or strung through ducts and conduits may turn to wireless links to fill gaps in coverage because geographic or legal limits on access to rights of way. Given these common elements, there is no reason why wireless attachments cannot be accommodated within the language of the pole attachment law. Indeed, wireless carriers attachments are not materially different than wireline equipment. Wireless attachments generally consist of microcell facilities or antennas attached to the side or top of utility distribution poles or transmission towers. In some cases, a cabinet housing radio or power equipment similar to equipment used by telephone companies or electric utilities may be located at or near the base of the pole or tower. There is no single configuration for these facilities. Like the wires or cables of a wireline carrier or electric company, antennae may be mounted on a poles cross-arms or bracketed to the side of the pole. With the broad discretion it enjoys in interpreting its authorizing statutes, the DTE could interpret section 25A to include wireless carriers as well as their antennae and other equipment in the pole attachment rules. *See Baybank v. Bornhofft*, 427 Mass. 571, 577, 694 N.E.2d 854, 858 (1998); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).[(6)]

In the alternative, if the DTE believes the Massachusetts statute does not authorize it to regulate wireless attachments, then it should say so clearly in this proceeding and allow wireless carriers to take advantage of their attachment rights under federal law, rather than leaving the question unresolved and creating unnecessary uncertainty for utilities and carriers alike. By expressly disclaiming jurisdiction over wireless carriers, the DTE could avoid disputes over wireless attachments and its statutory authority and reserve wireless pole attachment matters to the FCC. Under the clear mandate of the federal statute, the choice before the DTE is between regulating wireless carriers under the same rules as wireline carriers or disclaiming authority over attachments by wireless carriers altogether.

III. THE DEPARTMENT SHOULD PROVIDE CLEAR GUIDANCE ON THE MEANING OF NON-DISCRIMINATORY ACCESS, IN LIGHT OF AT&TS PAST EXPERIENCE WITH BELL ATLANTIC.

Although the proposed changes herald a movement toward non-discriminatory access for telecommunications carriers to utility poles, ducts, conduits, and rights-of-way, the lack of specificity in the regulations allow the utilities with monopoly power in the market for telecommunications and an incentive to maintain it, such as Bell Atlantic, to dictate the particular terms of license agreements, with expensive litigation as the only means for telecommunications carriers to obtain just, reasonable and non-

discriminatory access. The proposals that AT&T makes below are intended to reduce the possibility of piecemeal and expensive litigation otherwise necessary to resolve issues of non-discriminatory access.

A. Procedural Background

As noted at the outset of these comments, AT&T welcomes the Departments interest in this important issue. AT&T previously sought the Departments consideration of this issue in its arbitration proceeding to establish the terms of its interconnection agreement with Bell Atlantic. AT&T requested that non-discriminatory terms governing access to rights-of-way, poles and other structures be included in the arbitrated interconnection agreement. In support of its position, AT&T submitted a model "Master License Agreement for Pole Attachments and Conduit Occupancy" with terms that comply with the Telecommunications Act of 1996 and the guidelines set out in the FCCs *First Report and Order*. The Department declined to adopt the master license and instead held that, while it had preempted federal law in this area, it had not *at that time* developed particular regulations with which NYNEX should be required to comply. DPU 96-80/81 (August 29, 1997) at 10-11. In particular, the Department stated:

Accordingly, NYNEX, as the incumbent LEC, satisfies it [sic] duties under Section 251(b)(4) of the Act by complying with the Departments regulations. NYNEXs proposed language properly recognizes its obligation to modify its current license agreements *if and when ordered to do so by the Department.* Such modifications would be considered when, on its own motion or in response to a petition, the Department takes up the issue of whether its regulations require modification in light of changes in, and requirements of, federal regulations.

D.P.U. 96-80/81 (August 29, 1997) at 10-11 (emphasis added). As a result, the language in the Bell Atlantic-AT&T interconnection agreement now states:

BA shall provide to AT&T access to its rights of way ("ROW"), conduits, ducts and pole attachments on the terms and conditions including, without limitation, prices, consistent with the terms and conditions in the current license agreements between the Parties ("License Agreements") *or as otherwise required by the Department.*

Agreement between New England Telephone and Telegraph Company d/b/a Bell Atlantic and AT&T Communications of New England, Inc. (Appendix A, Part III, p. 138), filed with the Department on April 16, 1998 (emphasis added).[7]

The Department has now proposed changes to the regulations regarding access to utility poles, ducts, conduits and rights-of-way and has opened this docket to solicit comments on the adequacy of those changes. The stated purpose of the regulation is "to ensure that telecommunications carriers . . . have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-ways on rates, terms and conditions that are just and reasonable," 220 CMR 45.01, and indeed it does take an important step towards that goal. The proposed language to be added to the regulations, however, is too abstractly worded and in insufficient detail to adequately accomplish its goals. Key concepts such as "non-discriminatory," "access" and "just and reasonable" are not defined and leave ample room for Bell Atlantic to impose terms in licensing agreements that, despite Bell Atlantics contentions to the contrary, are--or have the effect of being--discriminatory. In short, the rules are not sufficiently specific to determine what Bell Atlantics "obligation [is] to modify its current license agreements if and when ordered to do so by the Department." D.P.U. 96-80/81 (August 29, 1997) at 10-11

Although the changes to 220 CMR 45.00 call for non-discriminatory access in broad terms, specific provisions, even at a rudimentary level, are not spelled out, and thus leave the utility in the position to dictate--at least in the first instance--what is just and reasonable. A competitor, with no bargaining power except the threat of filing a complaint with the Department, will either have to capitulate or start a lengthy and expensive complaint process, thereby further delaying its access to poles and conduits. *Such a burden and delay for the telecommunications carrier, and not for Bell Atlantic, is in itself discriminatory.* In

addition, such piecemeal litigation would place an unnecessary burden on the Department that could be avoided by a more comprehensive and substantive set of rules.

B. Effect of the Departments Proposed Rules on Bell Atlantics Existing Agreements Illustrates Potential Problems Arising From Lack of Specificity.

Based on the generic language in the regulations, it is not clear whether terms unfavorable to AT&T in past license agreements would be objectionable. License agreements used by Bell Atlantic (then NYNEX) in the past, which did not bar access to pole attachments, but provided considerably more favorable terms for the utility, may continue to be Bell Atlantics starting point for negotiations. Two typical license agreements signed in 1990 included numerous provisions that AT&T believes are discriminatory and in violation of the Departments rules but which Bell Atlantic may contend are not.[(8)] Among the provisions are the following:

(1) Bell Atlantic has assumed no obligation to construct, retain, or maintain any facility not needed for its own service requirements, allowing it to unilaterally cease providing access to pathways to its competitors wherever Bell Atlantic itself does not need the facility. (Arial Agreement, Article II, Section (c).)

(2) Bell Atlantic may, without notice to AT&T, remove pole attachments or rearrange facilities placed by AT&T if it believes they present a safety hazard. While a general right to act immediately may not be unreasonable, Bell Atlantic also absolves itself totally of all liability for any action it may take, even if it acted unreasonably, with gross negligence or was guilty of willful misconduct in any particular situation - which is unreasonable. (Aerial Agreement, Article V, Section B; Conduit Agreement, Article VIII, Section (d).)

(3) Bell Atlantic reserves the right to refuse a license to AT&T when space on a pole is required for Bell Atlantics own exclusive use and to limit capacity or exclude AT&T altogether from a conduit system, at its sole discretion, to accommodate Bell Atlantics own needs, *whether its needs are immediate and concrete or future and speculative*. (Aerial Agreement, Article VIII, Section B; Conduit Agreement, article VIII, Sections (b) and (c).)

(4) Bell Atlantic requires AT&T to bear all expenses associated with rearranging facilities to accommodate AT&T, but provides AT&T no credit if Bell Atlantic realizes additional revenue from the additional space that results from the rearrangement. (Aerial Agreement, Article VIII, Section (D).)

(5) Bell Atlantic also requires that AT&T bear the expense associated with rearrangement of AT&Ts facilities that Bell Atlantic orders AT&T to make to accommodate Bell Atlantics own service needs. (Aerial Agreement, Article VIII, Section (E); Conduit Agreement, Article VIII, Section (e).)

(6) Bell Atlantic reserves the right to operate its facilities in "a manner as will enable it to fulfill its own service requirements," without regard to AT&Ts service needs. (Both Agreements, Article XIII, Section (A).) The same provisions relieve Bell Atlantic from liability for interference with AT&Ts service (except when resulting from Bell Atlantics sole negligence) but these provisions are not made reciprocal to protect AT&T from the same type of liability.

(7) Bell Atlantic requires broad indemnification from AT&T for every manner of loss Bell Atlantic could possibly sustain as a result of any AT&T negligence (indeed, it purports to impose no limit at all on AT&Ts liability); however, the clause is not reciprocal and provides no protection for AT&T against similar claims arising from Bell Atlantics negligence. (Both Agreements, Article XIII, Sections (C) and (D).)

(8) Bell Atlantic has granted itself broad preferences in emergency conditions, providing that Bell Atlantics "work shall take precedence over any and all operations of Licensee [AT&T] in Licensors conduit system," and allowing Bell Atlantic to displace or rearrange AT&Ts facilities to accommodate its own. (Conduit Agreement, Appendix 2, Section 38.)

The terms of these agreements are obviously dictated by a party who had (and still has) monopoly control of local facilities to a party who had no bargaining leverage and no choice but to accept its one-sided terms. Under the regulations as currently drafted, Bell Atlantic would be free to demand terms for access such as those set out above, and impose on the attaching telecommunications carriers the burden to bring Bell Atlantic before the Department for a term-by-term analysis of whether the provisions are discriminatory. The time and cost to both the parties and the Department in litigating every contract provision in a piecemeal fashion is not an efficient use of the Departments scarce resources. Moreover, each time an individual telecommunication carrier complains that a specific Bell Atlantic provision violates the Departments rules, other telecommunications carriers will feel compelled to intervene in order to protect their own interests. Each dispute will become a "mini-rulemaking" proceeding with respect to the issue raised by the dispute.

C. AT&Ts Proposal for More Detailed Rules and a Standard Agreement Makes a Balanced License Agreement More Likely in Situations Where the Utility Is a Competitor of the Licensee.

As noted above, in the arbitration of its interconnection agreement with Bell Atlantic, AT&T sought to have the Department order the adoption of a fair and balanced, non-discriminatory master license agreement. The issue now, therefore, is whether the Departments proposed rules are adequate to determine a telecommunication carriers right to similar language. Under the Departments proposed rules and contemplated regulatory scheme, a telecommunications carrier has only the right to dispute specific provisions of a contract that is drafted by a utility and imposed on its competitors. The proposed rules essentially cede to a utility that competes with its licensee the power to draft and impose the initial model licensing agreement. Attaching telecommunications carriers are then given the opportunity to dispute specific provisions. Obtaining a fair and balanced license agreement, such as the one that AT&T had proposed in its arbitration with Bell Atlantic, by disputing piecemeal individual provisions of a utility license agreement is inefficient, cumbersome and ultimately unsatisfactory.

Accordingly, AT&T proposes that the Department proceed by: (a) adopting more specific rules that prescribe what non-discriminatory access is in situations that will frequently arise and/or (b) adopting a standard master license agreement to be used unless the parties, by mutual consent, agree to vary its terms, or - in the absence of mutual consent - the Department orders a change in a specific situation upon a motion or petition of one of the parties. In Exhibit A, attached hereto, AT&T presents its recommended rules in the form of redlined text, marked to show changes from the Departments proposed rules. These recommendations represent a bare minimum, and AT&T would welcome additions from other parties that promote non-discriminatory access. In Exhibit B, attached hereto, AT&T has attached the master license agreement AT&T proposed in its arbitration proceeding with Bell Atlantic. Only minor changes to this document would be required in order to make it suitable as a model agreement under the Departments new rules. AT&T recommends that the Department follow the course set by the New York Public Service Commission and establish a standard license agreement that is presumptively lawful and provides the "default" position if the parties are unable to agree otherwise.[9] Discussion in support of the more important aspects of the proposed rules and the model agreement follows below.

1. Capacity and Expansion; Reservation For Future Use

The Departments proposed language for 220 CMR 45.00 does not address whether a utility can reserve space on a facility to itself for future needs. Allowing Bell Atlantic, for example, to reserve space results in the denial of access to a competing telecommunications carrier prepared to offer current service even though there is unused capacity on the pole or in the duct. Moreover, it can have the effect of shifting to the new entrant the cost of creating additional capacity - a barrier to entry that Bell Atlantic has an incentive to raise.

If, for example, an attaching telecommunications carrier seeks to make an attachment on a facility that has no available capacity, the attaching carrier - under 47 U.S.C. § 224(h) - would bear the full cost of modifying the facility to create new capacity, such as by replacing an existing pole with a taller pole. By reserving available space for future use, the utility could force the competitor to pay for new utility

facilities. "Permitting an incumbent LEC, for example, to reserve space for local exchange service, to the detriment of a would-be entrant into the local exchange business, would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers." *First Report and Order*, ¶ 1170. Accordingly, both in AT&Ts proposed master license agreement (Section 4.01) and in its proposed rules (Section 45.05), a utility is not permitted to reserve space on its poles, ducts, conduits and rights-of-way for its own telecommunications services or for those of others, and the utility is not permitted to withhold or delay allocations of such facilities to a telecommunications carrier because of the potential or forecasted needs of itself or of other parties.[(10)]

2. Requirements Relating to Personnel

While a utility should be able to require that only properly trained persons work in the proximity of its lines, the utility should not be able to require parties seeking to make attachments to use the individual employees or contractors hired or predesignated by the utility. Accordingly, AT&Ts proposed language would require that individuals who will work on the facilities have the same qualifications, in terms of training, as the utilitys own workers, but that the party seeking access will be able to use any individual workers who meet these criteria. As the FCC recognized, "Allowing a utility to dictate that only specific employees or contractors be used would impede the access that Congress sought to bestow on telecommunications providers and cable operators and would inevitably lead to disputes over rates to be paid to the workers." *First Report and Order*, ¶ 1182. Requiring an attaching telecommunications carrier to use the utilitys employees gives the utility unwarranted control over the attaching carriers ability to respond to its own customers needs; it also will produce unnecessary litigation over issues of labor and materials costs and reasonable time estimates for work to be completed--issues that took up a considerable amount of the Departments time in the interconnection agreement arbitration proceedings.

3. Access To Records and Field-Based Information

The Departments proposed rules do not provide the necessary specificity to ensure non-discriminatory access to information. A utility has complete control of and access to all records and information concerning its poles, conduit systems and other facilities. An attaching telecommunications carrier must, therefore, have reasonable access to such information as well. AT&T proposes that, after an attaching carriers request, a utility must provide facility route maps at a city level of existing poles and other facilities, as well as engineering records, drawings, and information regarding facility availability and condition. (*See* AT&T proposed rule, Section 45.04(7) and AT&T master license agreement Section 7.01A.)

Furthermore, the telecommunications carrier should be given notice and have the option to be present at any field-based survey in order to confirm usability and assess the condition of the structure. (*See* AT&T proposed rule, Section 45.04(7) and AT&T master license agreement, Section 7.01A.) In order to efficiently use the facilities to which the regulations provide nondiscriminatory access, an attaching telecommunications carrier must have the same data as the utility to confirm that structures will meet the attaching carriers needs. Under the regulations as currently proposed, information relevant to an attaching carriers decision will not be provided until after it has been denied access to a particular structure and has filed a complaint pursuant to 220 CMR 45.04, in the case of an inappropriate denial. Where the utility grants access without the attaching carrier having had the benefit of a field survey, there is the risk that existing conditions are not suitable for the attaching carriers facilities and the delayed acquisition of such knowledge will have resulted in wasted time and effort.

4. Controlling Improper Denial of Access

The regulations should recognize that a denial of access, while proper in some cases, is an exception to the general mandate of Section 224(f). Under the Departments proposed rules, a utility may deny access "where there is insufficient capacity or for reasons of safety, reliability and generally applicable

engineering purposes." 220 CMR 45.03(1). AT&T recognizes that the Departments proposed rule is based on 47 U.S.C. § 224(f). The Department is, however, free to promulgate rules that provide even greater assurances of non-discriminatory access than those in Section 224(f). AT&T believes that the proposed rule should - at a minimum - be modified to make it clear that the utility is not the sole arbiter of what constitutes "safety, reliability and generally applicable engineering purposes." If those words have any objective meaning beyond what a utility claims that they mean, it should be possible for engineers or other technical representatives of the attaching telecommunications carrier and the utility to agree that such considerations warrant denial of access under the circumstances. (Indeed, "generally applicable engineering purposes," by its very name indicates a purpose that most engineers would agree is appropriate.) AT&T has accordingly proposed language that indicates that the judgment regarding "safety, reliability and generally applicable engineering purposes" should be a joint one of both the attaching carrier and the utility. (*See* AT&Ts recommended changes to proposed rules, Section 45.02.) (Obviously, where there is disagreement, it will be up to the Department to resolve the issue, if either of the parties believes that it is important enough to bring it to the Departments attention.)

Moreover, because utilities are in the best position to determine when access should be denied (because they possess the information and expertise to make such decisions and because of the varied circumstances impacting these decisions), it is appropriate that the utility bear the burden of demonstrating that its denial of access to a telecommunications carrier fits within the narrow exception discussed above. *See First Report and Order*, ¶ 1222. As a result, AT&T has proposed changes to the Departments proposed 220 CMR 45.07 in order to make clear the utilitys burden in such situations.

5. Obligation to Maintain or Otherwise Make Available Facilities for Term of License

Under the Departments proposed rules, a utility may enter into a license agreement and receive payments under it without any obligation to maintain the facilities that are the subject of the agreement and upon which the licensee is relying. Indeed, a utility may remove such facilities so long as it provides 60 days advance notice to the licensee under the Departments proposed rules. 220 CMR 45.03(3)(a). The receipt of notice 60 days prior to the loss of a facility that is essential to serve an important customer is cold-comfort to a telecommunications carrier seeking to compete with Bell Atlantic. At a minimum, the notice period should be 120 days. More importantly, the utility should be required to grant to the licensee a right to maintain and use the facility which the utility seeks to abandon. (*See* AT&T proposed rule, Section 45.03(4).) The licensee would, of course, bear the expenses of the continued maintenance and use. Together with an explicitly stated duration for the agreement of not less than five years, see AT&T proposed rule, Section 45.10, a telecommunications carrier will be able to rely on the facilities it is using to a similar extent that Bell Atlantic can.[(11)]

6. Non-Discriminatory Capacity Expansions

In situations where a utility, in reviewing its capacity for its own needs, determines that additional capacity is required (*e.g.*, a higher pole), the utility has the option of replacing the existing pole with a higher one if it believes that the expense justifies it. If attaching telecommunications carriers are to have non-discriminatory access to a utilitys poles, conduits and rights-of-way, the attaching carrier must have the same option. AT&Ts proposed rules, therefore, do not allow the utility to refuse to replace existing facilities with facilities of greater capacity, provided that the telecommunications carrier pays its fair, *i.e.*, "proportionate" share, of the cost of the additional facilities.[(12)] (*See* AT&T proposed rule, Section 45.03(3).)

7. Mirror Image Rights to Be Free From Interference By Others; Indemnification

Bell Atlantics existing license agreements are grossly unbalanced regarding many issues, but few are so obvious as the right of one party to interfere with the other partys facilities, where Bell Atlantic has all the rights and the licensee has none. As noted above, in its existing license agreements, Bell Atlantic reserves the right to operate its facilities in "a manner as will enable it to fulfill its own service requirements,"

without regard to AT&Ts service needs (Article XIII, Section (A) of the above referenced, existing license agreements). AT&T, therefore, has proposed rules that make the rights of both licensee and utility to maintain and operate facilities free of unreasonable or unjustified interference of others mutual and reciprocal. (*See* AT&T proposed rule, Sections 45.04(3),(4).)

Another patently obvious area of imbalance in existing license agreements is the area that relates to liability and indemnification. Bell Atlantic requires broad indemnification from AT&T for every manner of loss Bell Atlantic could possibly sustain as a result of any AT&T negligence, while providing no reciprocity for the licensee whatsoever (Article XIII, Sections (C) and (D) of the above referenced, existing licensing agreements). AT&Ts proposed rules also address this imbalance. (*See* AT&T proposed rule, Section 45.09.)

8. Non-Discriminatory Access to Utility Rights-of-Way and Conduit in Third-Party Owned Buildings

Where a utility currently has rights-of-way in buildings owned by third parties, such rights represent a huge and substantial competitive advantage to a utility that competes with a new entrant in the local telecommunications market. A utility in that situation should not be permitted to use such rights for telecommunications services unless it also makes such rights available to attaching telecommunications carriers, to the extent that it has authority to do so. AT&T, therefore, proposes rules to accomplish that objective. (*See* AT&T proposed rule, Section 45.04(2).)

IV. CONCLUSION

For the reasons stated above, AT&T respectfully requests that the Department consider the proposed rules in Exhibit A attached hereto and require utilities to submit standard form license agreements similar to the one attached hereto as Exhibit B.

Respectfully submitted,

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1. 47 U.S.C. § 224.

2. *See Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777, 6798 ¶ 39 (1998) ("*Pole Attachment Order*"), *review pending sub nom*, *Gulf Power v. FCC*, No. 98-6222 (11th Cir.).

3. 47 U.S.C. § 224(f) (emphasis added). *See also* 47 U.S.C. § 224(d)(3) (prescribing interim attachment rate for "*any* telecommunications carrier" providing "*any* telecommunications service") (emphasis added).

4. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, ¶ 993 (1996) ("*Local Competition Order*"), *rev'd on other grounds, Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted sub nom., AT&T Corp. v. Iowa Utilities Board*, 66 U.S.L.W. 3387, 66 U.S.L.W. 3490 (U.S. Jan. 26, 1998) (No. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1411).

5. The DTE planned to consider access to conduits, poles, and rights of way in D.P.U. 94-185, which was opened "to determine and put in place the structural components necessary to ensure the development of open markets, relying on competitive forces wherever possible, in order that the benefits associated with competition will be realized by all telecommunications customers in the Commonwealth." *Investigation by the Department on its own motion into IntraLATA and Local Exchange Competition in Massachusetts*, D.P.U. 94-185, at 1-3 (Aug. 29, 1996). However, the DTE significantly reduced the scope of 94-185 upon enactment of the 1996 Act and has since initiated individual proceedings to consider many of the same issues. *Id.*

6. Under the 1996 Acts provision preempting State and local laws that unreasonably discriminate against wireless carriers in the placement of facilities, *see* 47 U.S.C. § 332(c)(7), wireless carriers arguably are

"authorized" to use the "public ways" in the same way as other carriers. The effect of this provision is to make wireless providers "licensees" within the meaning of the Massachusetts pole attachment statute.

7. The issue of non-discriminatory access to poles and rights-of-way subsequently was raised by complainant cable companies in DPU/DTE 97-82, but the Department stated that the issues would be considered "in alternative fora." DPU/DTE 97-82 (Feb. 11, 1998) at 8.

8. In the interest of space and economy, AT&T has not attached the referenced license agreements of Bell Atlantic. They are, however, attached to AT&Ts brief in its arbitration docket, DPU/DTE 96-80/81, that was filed on June 25, 1997. Because rules and regulations cannot be decided in the abstract and should be based on the experience that has been developed, AT&T would be pleased to provide additional copies of the referenced Bell Atlantic license agreements for the Departments convenience, if it is so desired.

9. In New York, the Public Service Commission has approved three different standard agreements (relating to access to rights-of-way, conduits and pole attachments, respectively) in connection with Bell Atlantics efforts to obtain Section 271 approval. (Non-discriminatory access to an ILECs pathways is, of course, one of the 14 point checklist items.)

10. In accordance with the FCCs rules, AT&Ts proposed rules distinguish between a reservation for future need asserted by an incumbent local exchange carrier and one asserted by an electric utility. *See*, FCC First Report and Order, ¶¶ 1169-1170.

11. As the owner of the pole, conduit or interest in rights-of-way, Bell Atlantic will always have the superior position associated with rights of indefinitely long duration.

12. The provision for "proportionate" share is necessitated by the interest of the utility in using capacity expansion requested by the telecommunications carrier as an opportunity to efficiently install additional capacity for itself. It is often the case that it is not economic to add capacity in small increments and the utility may add more capacity than the attaching carrier requires.